COMMENTS OF MICHIGAN ELECTRIC AND GAS ASSOCIATION ON HB 6358 (Substitute Draft 2)

Mr. Chairman and members of the committee, thank you for the opportunity to provide these comments. My name is Jim Ault and I am the president of the Michigan Electric and Gas Association (MEGA), a trade association of investor-owned electric and gas utilities serving Michigan customers. The members include: Alpena Power Company, Aurora Gas Company, Citizens Gas Fuel Company, Edison Sault Electric Company, Indiana Michigan Power, Michigan Gas Utilities, Upper Peninsula Power Company, We Energies, Wisconsin Public Service Corporation and Xcel Energy.

On behalf of the members, I offer these comments on HB 6358, the draft merger legislation. MEGA is not necessarily opposed to the concept of some MPSC review of mergers; however the current draft leaves some significant questions. We provided informal comments on the initial draft at an earlier stage and are presently considering the language circulated just before the labor day weekend. These comments focus on the recent revisions.

The current areas of concern to us are as follows:

Section 1 creates an exemption for assets sold in the normal course of business. If this was intended to create an exception for minor transfers of utility stock or assets, it leaves uncertainty. The normal course of business for a utility may be limited to the sale of its utility service to customers. The apparent scope of the new law would include occasional transfers of the stock of a small closely held utility, such as in an estate transaction with no effect on utility operations or rates. Another issue for exemption would be in situations where the utility has most of its operations in another state and that state and/or federal regulators approve the transaction – this approval could be reviewed but allowed deference. Greater clarity here would be welcome.

Section 2 assigns the MPSC the role of determining what activities fall under the statute as acquisition, transfer or merger activity, by order. This is a rulemaking issue and it is also a rather broad delegation of authority to an agency to determine the scope of a new law.

Section 3 proposes the development of filing procedures and content via formal administrative rules. The rulemaking process can take a year or more, leaving uncertainty in the period before the rules are established. One way to address this is to delay effectiveness until the final rules are adopted.

Sections 4 and 5 establish a time limit of 30 or up to 120 days for the MPSC to review a transaction, once the filing is complete. However, the time could be extended indefinitely if the MPSC issues repeated determinations that a filing and the materials submitted are incomplete. Alternatively, a utility could file

"everything but the kitchen sink" to comply, but this would create an unreasonable burden. One solution is to provide that upon initial determination that a filing is incomplete, the MPSC shall include a specific list of what is needed. The 6 month (180 day) advance filing requirement is quite a long period for routine or minor transactions that may be subject to this act. More flexibility is needed, perhaps using financial impact levels to trigger the longer advance filing requirements.

Section 4 now says that the MPSC shall issue "general findings and comments" with regard to a proposed transaction reviewed under the act. This phase replaced the power of the MPSC to issue an "advisory opinion" used in the earlier draft. The new terminology raises substantial questions.

For instance, does the power to issue general findings include the power to approve or disapprove a transaction? Does the power to issue findings include the authority to impose conditions on the transaction other than those developed by the parties? Are the findings under this act then binding in future regulatory proceedings, such as rate cases? An aggressive agency interpretation could leave the MPSC with very broad authority to disapprove the proposal or impose conditions, leaving it to the courts to resolve the question of statutory interpretation, under the rule of deference to an administrative agency's interpretation. Clearer language on the scope of authority would be most welcome here.

Section 5 requires disclosure of books and records by all parties but says nothing about protecting confidentiality of information from FOIA disclosure. Such protections are common in other areas of regulation.

Section 6 lists very broad areas to be covered in the MPSC findings, including adverse rate impact, adverse impact on energy service, subsidization of unregulated activity, harp to capital structure, adverse effects on competition, operational impacts, and general public policy or interest. Any one of these is subject to expansive interpretation and provides no limits on the scope of inquiry. Combined with the authority to issue general findings this statute could be construed as a very broad grant of authority to the agency, which could be used in unknown manner by a future commission.

MEGA and its members are willing to participate in any discussions of the statutory language to resolve these issues, should the committee determine to conduct meetings to address these and any other concerns. Thank you.

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James A. Ault
President of MEGA